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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 815

CHICAGO & EASTERN ILLINOIS RAILROAD
Appellant,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

On Appeal From the United States District Court for the Southern District of New York.

REPLY BRIEF OF APPELLANT CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT

Appellant Chicago & Eastern Illinois Railroad Company (C&EI), in its Jurisdictional Statement and Brief argued that the community of interests created between the merged company and each of the protected carriers by the indemnity conditions would compound the economic injury which would befall the C&EI as a result of the merger itself and which had prompted the C&EI to ask for protective conditions. The C&EI pointed out that creation of such a community of interests completely

nullified the Commission's finding that the C&EI "undoubtedly will have the benefit of intensified competitive efforts by the carriers with which it connects on routes competitive with those of the Transportation Company" (327 ICC at 541-542).

The C&EI also pointed out that the Commission's finding that the C&EI provides "superior service in the pertinent areas of competition" (327 ICC at 541) directly conflicts with the findings made by the Commission on a comprehensive record specifically directed to that point, that the C&EI is "relatively small, financially weak and physically deficient," and unable "to compete with the relatively large, well equipped, vigorous, long line railroads operating in the same territory" (327 ICC 279).

Most of the Appellees have completely ignored the inconsistencies in the foregoing findings and also ignored the fact that the merger itself, aside from the indemnity conditions, will have a substantial impact on the C&EI.

The Commission alone of all the Appellees attempted to show that the merger itself, aside from the community of interests created by the indemnity conditions, will not adversely affect the C&EI (Commission Brief, Page 92 *et seq.*). The Commission stated that the position of the C&EI "merits independent consideration," and our arguments herein will be directed to such consideration. Before doing so, however, we wish to correct a misstatement by Commission Counsel that the Commission granted some of the conditions requested by the C&EI. The Commission obviously did not grant any of the conditions (327 ICC at 541-542).

ARGUMENT

I.

THE COMMISSION'S FAILURE TO EXPLAIN THE CONFLICTS BETWEEN ITS FINDINGS REGARDING THE IMPACT OF THE MERGER ON THE C&EI AND ITS FINDINGS IN THE C&EI CONTROL CASE IS FATAL.

In *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company*, 327 ICC 279, the Commission found, on a comprehensive record specifically directed to the point, that the C&EI is "relatively small, financially weak and physically deficient", and unable "to compete with the relatively large, well-equipped, vigorous, long-line railroads operating in the same territory." The Commission has made no attempt to explain the conflicts between that finding and the finding in the instant case regarding the C&EI's "superior service", nor did it attempt to explain the conflict between its creation of a community of interests through prescription of indemnity conditions and its finding that the C&EI undoubtedly will have the benefit of intensified competitive efforts of its railroad connections to the east. Rather, the Commission chose to rely exclusively on the findings of the Examiners regarding the impact of the merger on the C&EI (Brief, 92 *et seq.*).

C&EI, in its Exceptions to the Recommended Report of the Examiners, analyzed the findings of the Examiners with respect to specific movements of traffic contained in the C&EI traffic diversion study. Excerpts from these exceptions were included in the record in the court below (R. 891 to 895) and are attached hereto as Appendix "A".

This analysis showed that the Examiners' conception of the facts with respect to the subject movements of traffic were completely erroneous, the Examiners having even gone so far as to find that the New York Central presently can serve in single line service designated localities which the Central actually does not serve. These findings of the Examiners with respect to the C&EI traffic study were completely demolished, yet neither the Commission in its reports nor Commission counsel in their brief have mentioned the true facts as set out in the C&EI's Exceptions. The C&EI has yet to be told that the recital of the facts set forth in its exceptions is erroneous and that the findings of the Examiners with respect to the C&EI traffic study are correct.

Commission counsel refer on pages 93-94 of their brief to a statement of the Examiners that 1877 cars in the C&EI traffic study were destined to a closed point on the C&EI, and such traffic would not be lost to the merged company. The C&EI conceded this rather obvious fact, and excluded such traffic from its diversion study (Appendix "A" to this Reply Brief).

Commission counsel also refer (Page 94) to a statement of the Examiners that, with respect to overhead traffic, approval of the merger will not create any new channels of trade or gateways for the merged company not presently maintained by Central, and that between its major points C&EI will still have the best service routes. This statement, besides being erroneous, unduly restricts the area of competition between the C&EI and the merged company to the area in which the C&EI's lines are located. Of approximately 6700 carloads contained in the C&EI's studies, approximately 2150 carloads were handled by the C&EI in overhead service; i.e., they were

neither originated nor terminated by the C&EI (Recommended Report, Sheet 315). Moreover, only shipments which the C&EI interchanged with other carriers were included in the traffic study (*idem*). With respect to this major area of competition, (shipments to and from eastern destinations which the C&EI interchanges with other railroads, and particularly those which it handles in overhead service), the Examiners made comprehensive findings as to the vastly improved service that will be offered by the merged company. The Commission itself also made such findings, particularly with respect to the merged company's proposed operation of through trains between principal cities, substantial reductions in transit time, single-line service between more points, less route circuity, less handling of freight, less switching of cars, and improved ability to augment its car fleet (327 ICC at 490-491).

The findings of the Examiners, relied upon by Commission Counsel, therefore not only are erroneous but are irrelevant to the issues of this case.

Commission Counsel advert on Page 93 of their Brief to the Examiners' criticisms of some aspects of the C&EI's diversion studies. But the Examiners were critical of the diversion studies of a number of parties, including E-L, D&H and B&M (Recommended Report Sheets 360, 364, 374; Appendix A hereto). Nevertheless, the Examiners found that all three of these railroads would be adversely affected by the merger, largely because of the nature of their relationships with, and dependency upon, each other (*idem*). The Examiners also were highly critical of a traffic study introduced by the Commission's Bureau of Inquiry, and rejected it as having little probative value (Recommended Report, Sheets 162-163).

The Examiners' criticisms of the various traffic studies may be understandable, since railroads handling only a small portion of the total traffic in the Eastern states introduced evidence of potential diversion. They were handicapped in their presentation by the absence of traffic evidence by other railroads with which they interchange traffic. Under those circumstances, and in view of the magnitude of the proposed merger, we are not persuaded by the Commission's disclaimer of responsibility for developing a record reflecting the traffic diversion potential of the merged company in the entire area in which it operates. The Commission must have felt at least some sense of responsibility in this area when it directed its Bureau of Inquiry to intervene in the proceeding. Its subsequent disclaimer comes with ill grace.

The Commission's failure to reconcile its findings regarding the "superior" service of the C&EI with its findings to the effect that the C&EI is small, weak and deficient, and unable to compete with long line hauls, is fatally defective. The same is true of counsels' misplaced reliance upon the erroneous findings of the Examiners.

II.

THE AUTHORITIES CITED BY APPELLEES DO NOT SUPPORT THE COMMISSION'S ACTION IN DEFERRING PROTECTION OF OTHER RAILROADS UNTIL AFTER MERGER IS CONSUMMATED.

Appellees have cited a number of authorities for the proposition the Commission may properly defer protection of other carriers until after merger of the Pennsylvania and the Central. None of these authorities is apposite.

It is true that in *Missouri Pacific—Control—Chicago & Eastern Illinois Railroad Company*, 327 ICC 279, the Com-

mission attached to its approval of acquisition a condition that Mo Pac-C&EI negotiate for the sale of an important branch line of the C&EI to the Louisville & Nashville, which had petitioned for inclusion in the proposed transaction. However, it is equally true that the Louisville & Nashville at the same time was authorized to operate over said branch line pending determination of its subsequently filed application for authority to acquire the line. This authorization is to become effective on the date that the Missouri Pacific acquires control of the C&EI (327 ICC 279). Thus the Louisville and Nashville will be completely protected from the date on which the acquisition of the C&EI is consummated, a situation far different from the one with which the Appellant railroads are confronted in the instant case.

Appellees also rely upon cases in which the Commission has approved transactions subject to Section 5 of the Act, with the reservation of power to take further action to protect the interests of employees affected thereby (for example, Commission Brief, Page 58). However, employee protective conditions thus imposed have uniformly been made retroactive to the date of effectuation of the transaction, and no harm was done by deferral of Commission action. Similarly, no harmful consequences could flow from Commission approval of transactions under Section 5 subject to the condition that smaller railroads subsequently be included in the transaction (e.g., Commission Brief, Page 59). There is little danger of consolidating railroads taking any action detrimental to the interests of carriers which they know will be included within their systems.

Other cases relied on by Appellees are adequately dealt with in the dissenting opinion below, pertinent portions

of which are attached as Appendix "B" to our Jurisdictional Statement and Brief.

All of the Appellees have one thing in common—they have over-simplified the substantial and controversial issues that are before the Commission on further hearing. Some of the weighty matters involved in just one of the three issues now before the Commission are noted in footnote 17 on page 37 of the brief of the Pennsylvania and the New York Central. It is there shown that in order to assess the impact of the indemnity conditions upon the unprotected carriers it is necessary to analyze the structure of divisions of revenues among carriers participating in specific movements of traffic, determination of the efficacy in specific instances of performing long haul service or service involving shorter hauls, historical traffic patterns, and the effect of contracts between carriers and shippers. These matters present substantial questions for resolution by the Commission in the first instance and it is only after thorough analysis of the substantial evidence of record in the further hearing that the Commission will even have a conception of the problems that it left undetermined when it authorized consummation of the merger.

III.

THE COMMISSION SHOULD HAVE IMPOSED THE PROTECTIVE CONDITIONS REQUESTED BY THE C&EI AND SHOULD HAVE DEFERRED CONSUMMATION OF THE MERGER UNTIL IT DECIDES WHAT FURTHER PROTECTION IS REQUIRED FOR THE C&EI AND OTHER RAILROAD APPELLANTS.

In view of the Commission's findings as to the vastly improved service to be offered by the merged company, the financial and physical weakness of the C&EI (as found by the Commission in the C&EI control proceeding), and

the evidence of record as to the traffic diversion potential of the merged company, the Commission should have attached to its approval of the merger the protective conditions requested by the C&EI. The Commission should also have deferred consummation of the merger until such time as it could devise adequate protection for the C&EI and other carriers from the effects of the community of interests created by the indemnity conditions.

CONCLUSION

The judgment of the District Court should be reversed and this case remanded to that court with instructions to enter an interlocutory injunction pending the final determination by the Commission of the substantial issues pending before it.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM EXCEPTIONS OF C&EI TO EXAMINERS' RECOMMENDED REPORT (R. 891-895)

To illustrate the diversionary potential of the merged company, the C&EI introduced a point-to-point study (Exh. H-191) showing the major movements of traffic (10 or more cars) originating or terminating at common points served by C&EI and Central, and common points served by C&EI and Pennsylvania. In discussing this traffic, the Examiners ignored their own findings as to the intensity of the competition between the C&EI and the applicants and the advantages which would accrue, to the merged company, and also ignored the testimony of railroad experts as to the diversionary influences attendant upon such advantages. The Examiners found that, as to 438 (refrigerators and auto parts) of the 646 shipments shown in the traffic study, "the merged company would stand in no better position than NYC today which has a single-line route and can supply all the equipment that is needed by such shipper" (Sheet 320). A mere glance at Exhibit H-191 will disclose that there are several shippers of the 438 shipments of refrigerators and auto parts referred to by the Examiners; and the consignees are located at such diverse places as Cleveland, Ohio, Columbus, Ohio, Washington, D. C., Bedford, Ohio, Delair, New Jersey, Metuchen, New Jersey and St. Louis, Missouri, to many of which localities the Central does *not* have single-line service. The identity of the shipper to whom the Central purportedly can supply all the special equipment needed by the shipper is not disclosed by the Examiners, and the statement is contrary to the testimony of

the Vice-President-Marketing of the Central that the Central *"never"* has all of the special equipment it needs (Tr. 17,722-17,723), that car supply is "one of the most important" factors in obtaining traffic (Tr. 17,725), and that it is hoped the proposed merger will enable the merged company to give better service, "including the availability of all-purpose cars and the availability of special-purpose cars" (Tr. 17,723). Having instituted on its own motion in *Ex Parte 241* an investigation into the adequacy of railroad car supply, the Commission can take official notice of the fact that there is an acute car shortage in the railroad industry. The merged company's "better service . . . including the availability of special purpose cars,"—obvously will enhance its ability to divert from the C&EI the traffic represented in the traffic study by the 438 shipments of refrigerators and auto parts.

The Examiners also referred to 59 cars of steel beams, included in the study, which moved C&EI-Pennsylvania from Evansville to Weirton, West Virginia, and concluded that, since the shipper is local to the C&EI and transit time purportedly is not considered important, this traffic cannot be regarded as vulnerable (Sheet 321). Aside from the fact that there is nothing in the record to indicate that the shipper is local to the C&EI or that transit time is not important, these shipments will be able, in the event of merger of applicants, to move in single-line service from Evansville to Weirton via the present New York Central to Terre Haute or Chicago, then via the present Pennsylvania to Weirton. There are obvious competitive advantages accruing from single-line service, not the least of which is that it is generally more economical, permitting the granting of lower rates. The merged company could lower its single-line rates on this traffic, and, under the Examiners' recommended traffic conditions, could re-

fuse to participate with the C&EI in joint rates at the same level. This obviously applies to all traffic presently handled jointly by C&EI with the Pennsylvania or Central and which could move in single-line service after merger.

The Examiners, by their silence, apparently concede that the remaining 149 shipments shown in Exhibit 191 would be subject to diversion by the merged company. It is obvious from the foregoing that all of the 646 shipments included in the study would be subject to diversion. This is emphasized by the finding of the Examiners that the plans of the applicants for the rerouting of traffic in the area served by the C&EI are designed to achieve economies and efficiencies (Sheets 316, 317), and by the testimony of the then Chairman of the Board of the Pennsylvania that such economies would result in reduced rates. There is nothing in the traffic conditions recommended by the Examiners that would require the merged company to permit its competitors, including the C&EI, to participate in such reduced rates, or that would prevent the merged company from offering its competitors such unattractive divisions of revenues under the reduced rates as to preclude their participation therein.

In finding that after merger the C&EI's routes from Chicago to St. Louis, Evansville and southern Illinois would still remain the better in terms of service to the South (Sheet 317), the Examiners selected only one of the many factors, hereinabove enumerated, conducive to traffic diversion, and ignored all others. The Examiners should have given particular effect to its finding that applicants' plans for the rerouting of traffic in the area served by the C&EI are designed to achieve economies and efficiencies; they should have made the concomitant finding that such economies and efficiencies could result

in lower rates not available to the merged company's competitors, including the C&EI.

It might be added, incidentally, that, contrary to the Examiners' statement (Sheet 316), the C&EI did not contend that the coal traffic moving Central-C&EI to Joppa, Illinois would be subject to diversion (see S-167). This traffic was excluded from the traffic study introduced in evidence as Exhibit H-191 (see recommended report, Sheet 319).

With respect to C&EI overhead traffic and C&EI-originated or terminated traffic interchanged with eastern carriers other than applicants, the Examiners stated that the traffic data submitted by the C&EI was not sufficiently specific to enable them to find that such traffic would be subject to diversion. The Examiners made the same criticisms of most of the traffic diversion studies introduced in evidence (recommended report, Sheets 163, 170, 296, 360, 364, 374). In offering such criticisms, the Examiners ignored the Commission's observation in *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 ICC 122, 170, that "in the area of traffic diversion . . . we are dealing in uncertainties and imponderables." And in F.D. No. 21755, *Missouri Pacific Railway Company—Control—Chicago & Eastern Illinois Railroad Company*, ... ICC ....., the Commission stated at Sheet 19:

> Routings are usually influenced by a shipper's self-interest in response to a variety of commercial and transportation factors. The most important of these is service-speed, transit privileges and facilities, care in handling, shipper convenience, etc.—but there are others, more or less imponderable and not readily ascertainable from any tabulation of car movements no matter how accurately compiled.

Nevertheless, the Commission did make findings as to the traffic diversion potential of applicants in the Seaboard-Coast Line and Missouri Pacific-C&EI proceedings. Also, the Examiners in the instant proceeding, although decrying the lack of specificity in the traffic studies submitted by the Boston & Maine, the Delaware & Hudson, and the Erie-Lackawanna, found that all three would be adversely affected by the merger (Sheets 360, 364, 374). The Examiners based these findings largely on the "nature of [the Boston & Maine's] operations and its relationship to the [Delaware & Hudson]" (Sheet 360), dependency of the Delaware & Hudson on the Erie-Lackawanna (Sheet 364), and the Erie-Lackawanna's "financial condition and other facts surrounding the relationship" between Erie-Lackawanna and the applicants (Sheet 374). The Examiners found that a major portion of Erie-Lackawanna's overhead and interline traffic, particularly traffic interchanged with the Central and Pennsylvania, would be subject to diversion, as would traffic moving to and from points served in common with the merged company (Sheet 373). The C&EI introduced evidence, and the Examiners found at Sheet 315, that the Erie-Lackawanna is one of the C&EI's major connections to the East. The predicted adverse effects of the merger on that company inevitably would work to the detriment of the C&EI. As the Examiners so aptly stated, competitive relationships with reference to overhead traffic do not necessarily depend on common service points, common junctions, or parallel lines, but rather on the ability of railroads to construct feasible, economically competitive routes with other roads (Sheet 317). In view of the Examiners' findings as to the impact of the merger on the Erie-Lackawanna, the C&EI would be unable to build such routes with that road, either on overhead traffic or on interline traffic to or from points located on either the C&EI or the Erie-Lackawanna.